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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 554

JULIUS ARONOFF,

Petitioner and Appellant below,

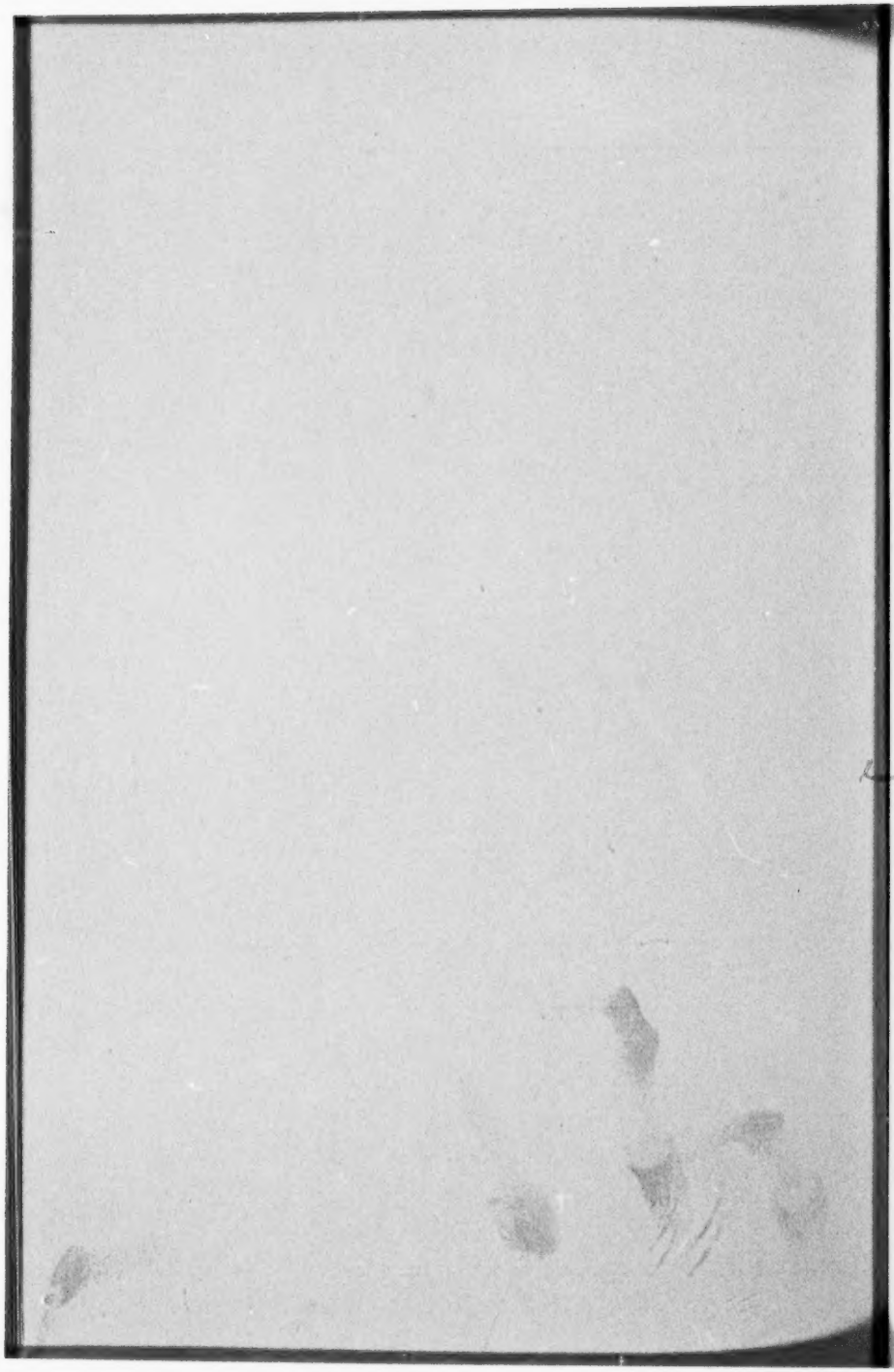
against

UNITED STATES OF AMERICA,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

CHARLES V. HALLEY, JR.,
Attorney for Petitioner.



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To the Honorable the Supreme Court of the United States:

The petition of JULIUS ARONOFF respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner was convicted by a jury after a trial in the United States District Court for the Eastern District of New York upon an indictment containing three counts (R. 7-27) charging him and three others: (1) with conspiring to violate the Bankruptcy Act, 11 U. S. C. A., Section 52(b), Subdivisions 1, 2 and 6; (2) with the substantive violation of Section 52(b), Subdivision 1, of said Act; and (3) with the substantive violation of Section 52(b), Subdivision 6, of said Act.

The jury found petitioner guilty on the three counts of the indictment, with a plea of leniency (R. 494), and he was sentenced to two years' imprisonment on each count, the sentences to run concurrently (R. 43).

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon grounds fully set forth in the assignments of error (R. 538-552). Upon such appeal, said Circuit Court of Appeals affirmed petitioner's conviction and rendered its opinion thereon.

II

Jurisdiction to Review

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein, affirming the conviction of the petitioner, on September 17, 1943. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347, Subdivisions A and C, and as amended by Section 240(A) under the Act of February 13, 1925, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States. The reasons directly hereinafter further set forth constitute valid grounds for invoking the jurisdiction of this Court.

III

Questions Presented

1. Whether or not there was evidence adduced upon the trial to prove any of the charges against petitioner, that is:

(a) That petitioner, knowingly and with criminal intent, entered into a conspiracy with others to transfer in anticipation of bankruptcy, and to conceal from its trustee in bankruptcy, property belonging to Famous Furniture Co. Inc., as charged in Count One of the Indictment.

(b) That petitioner, between March 1, 1940, and March 7, 1941, knowingly and fraudulently commenced to conceal, and between March 7, 1941, and November 6, 1942, the date of the filing of the indictment, knowingly and fraudulently concealed from the trustee in bankruptcy of Famous Furniture Co. Inc. property belonging to said bankrupt, as charged in Count Two of the Indictment.

(c) That, while Benjamin Goldberg and Harry Goldberg were officers of Famous Furniture Co. Inc., petitioner wilfully and fraudulently, in contemplation of proceedings under the Bankruptcy Act against said Famous Furniture Co. Inc., and with intent to defeat the Bankruptcy Act, aided and abetted said Benjamin Goldberg and Harry Goldberg in transferring property of said Famous Furniture Co. Inc., as charged in Count Three of the Indictment.

2. Whether or not evidence tending to show petitioner dealt with property ostensibly belonging to B. Glass Inc., a corporate entity distinct from Famous Furniture Co. Inc., the bankrupt, sustained any of the foregoing charges of the Indictment, notwithstanding that there was evidence adduced from which it might be assumed that said B. Glass Inc. was in some way, undefined and unproved, connected or associated with Famous Furniture Co. Inc., said bankrupt.

3. Whether or not evidence tending to show that petitioner and another purchased property in which Famous Furniture Co. Inc. may have had an equity (depending upon assumptions to be drawn from the evidence), and thereafter failed or refused to pay therefor, was sufficient to sustain any of the foregoing charges made in the Indictment.

4. Whether or not the charge of the Trial Court precluded petitioner from his constitutional right to a trial by jury in that, although there were clear issues of fact as to all such matters, it in effect instructed the jury to take

as facts established that the property involved was property of Famous Furniture Co. Inc., and that the dealings alleged to have been had by petitioner with respect thereto were criminal dealings as charged in the Indictment; and in that it in effect submitted to the jury as the sole test of petitioner's guilt or innocence the question of whether or not petitioner had in fact participated in said alleged dealings.

5. Whether or not the evidence adduced at the trial was sufficient to support the finding of guilt as to the petitioner, Julius Aronoff, and whether or not the affirmance of conviction by the Circuit Court of Appeals is not in direct conflict with applicable decisions of this Court, and has decided a Federal Question in a way probably in conflict with applicable decisions of this Court, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, particularly with respect to that part of the decision of affirmance which states that the probability was strong that the mortgagee would not have lent $5,000 unless there had been a substantial equity, which is wholly in conflict with the evidence and the applicable rules of law with respect to such evidence required in a criminal case; and with respect to the failure of the Trial Court and the Circuit Court to afford the petitioner a full and fair trial of all the issues presented by the evidence, thus depriving him of his constitutional rights to a fair trial by jury.

IV

The Reasons Relied on for the Allowance of the Writ

A. The evidence adduced to sustain the charges against petitioner was that: Petitioner's co-defendants Benjamin Goldberg and Harry Goldberg were the president and vice-president, respectively, of Famous Furniture Co. Inc.,

a corporation conducting a retail furniture store in Brooklyn, New York (R. 25). Benjamin Goldberg had acquired the assets of the corporation in 1939 (R. 231).

Some time later, according to Benjamin Goldberg's testimony for the Government, he acquired B. Glass Inc., a corporation engaged in conducting a retail furniture store in Suffern, New York, "in a form of a purchase" (R. 232). When asked if that was connected with Famous Furniture Co. Inc., the witness replied, "Everything that Ben Goldberg did was on behalf of the Famous Furniture Co." (R. 232).

It appeared from the testimony that on December 17, 1940, before petitioner met the Goldbergs, the Goldbergs held an auction sale at the premises of B. Glass Inc. at Suffern and sold all of the merchandise in the Suffern store (R. 56-57). Within a few days thereafter the Goldbergs restocked B. Glass Inc. with furniture, trucked to Suffern from Famous Furniture Co. Inc. in Brooklyn (R. 89-92). The Government's evidence as to the value of this furniture was conflicting, the witness Goldberg testifying that he restocked B. Glass Inc. with about $15,000 worth of furniture (R. 240), although the books of Famous Furniture Co. Inc., which the witness maintained were correct (R. 285), showed shipments of merchandise to B Glass Inc. of the value of $4,514.30 only (R. 329).

In any event, on January 7, 1941, Goldberg borrowed $5,000 from Majestic Factors Corporation, secured by the furniture and assets of B. Glass Inc. (R. 80-81, 240). The loan was made "on the basis that the assets of B. Glass Inc. were transferred to the Majestic Factors Corporation and all income of B. Glass Inc. was to be turned over to the Majestic Factors in reduction of the loan" (R. 81-82).

After the Government's witness Goldberg had restocked B. Glass Inc., and had transferred its assets to Majestic Factors Corporation in consideration of the foregoing loan, he opened negotiations through Newman to sell the entire stock of B. Glass Inc. (R. 235-236, 291-293). When it

appeared to the witness that he would not be able to realize enough on the sale to leave him with any cash after repayment of the loan to Majestic Factors Corporation, he dropped the negotiations with Newman (R. 235-236).

It was at this juncture that petitioner first met the witness Goldberg (R. 236-237). Petitioner had been active in various phases of the furniture business for many years (R. 363), and among other things had been in the habit of introducing buyers to furniture dealers on a commission basis (R. 366). According to the testimony of the Government's witness Goldberg, petitioner had learned of Goldberg's efforts to sell the stock of B. Glass Inc. and suggested that he had a wealthy friend with whom Goldberg might be able to do business (R. 236-237). The testimony then went on to the effect that the petitioner introduced the witness to the co-defendant Meyer Greenberg (R. 238) and, after some discussion, a sale was agreed upon whereby the witness agreed to sell to Greenberg and petitioner, and they agreed to purchase, all of the merchandise on the top floor of B. Glass Inc. (R. 242-243, 248).

In consummation of the alleged sale, the witness Goldberg instructed an employee at B. Glass Inc. to give petitioner and Greenberg all of the merchandise above the first floor (R. 243-249). The employee thereafter delivered the keys to co-defendant Greenberg (R. 108), who caused some of the furniture to be removed from the premises of B. Glass Inc. to the premises of the Bergen Furniture Co. in Brooklyn, New York (R. 116-120, 347). However, for some unexplained reason, at least two or three lots of the furniture removed were returned to the warehouse of Famous Furniture Co. Inc. in Brooklyn (R. 120).

Both the said employee and the truckman who carted the furniture testified that petitioner took no part in the removal thereof and that the entire transfer was made at the order and direction and under the supervision of the defendants Goldberg and the defendant Meyer Greenberg. Petitioner at no time exercised any supervision over,

or interest in, the transfers, or in the furniture that was the subject matter thereof (R. 116-117, 123-124, 132-133, 135-138, 349-353).

One of the truckmen testified that in addition to the furniture carted from B. Glass Inc. to Bergen Furniture Co. he delivered some furniture from the place of business of Famous Furniture Co. in Brooklyn to Bergen Furniture Co. (R. 123). These shipments were supervised and directed by defendants Goldberg and Greenberg and it does not appear that petitioner in any way participated therein or in fact had any knowledge thereof (R. 124).

It is conceded that at the time of these transactions petitioner was employed as a salesman by Bergen Furniture Co., but, although the Government made an attempt to show that petitioner had some kind of a proprietary interest in the Bergen, nothing appeared except the testimony of the co-defendant Goldberg to the effect that petitioner told him he had money invested in the business (R. 260). As opposed to this, other Government's witnesses testified that they knew petitioner only as a salesman for Bergen and that Moe Rosenberg and Victor Rosenberg were the owners and officers of that corporation (R. 132, 334-335, 353).

As appears, all of the foregoing transactions took place at the end of December, 1940, and in January, 1941. On March 7, 1941, an involuntary petition in bankruptcy was filed against the Famous Furniture Co. Inc. (R. 51), and it was adjudicated a bankrupt on March 29, 1941, and a trustee of the bankrupt estate was appointed on August 21, 1941 (R. 52).

Petitioner submits that the foregoing testimony adduced against him upon the trial was not sufficient to establish that he had any dealings with property belonging to the bankrupt, Famous Furniture Co. Inc., and that consequently, in the absence of such proof, the charges against him were not sustained. In this connection the testimony of the Government's witnesses not only failed to show, by

direction or indirection, that title to the property remained in Famous Furniture Co. after its transfer to B. Glass Inc., but that testimony went even further and established affirmatively that once the property entered the premises of B. Glass Inc. it was treated and considered for all purposes as property owned by that distinct corporate entity.

In addition, it was shown that, having attained the status of property of B. Glass Inc., the furniture was in turn transferred by B. Glass Inc. to still another corporate entity, namely, Majestic Factors Corporation. With respect to this last transfer of title it is pointed out that there is no clear proof that B. Glass Inc. retained any equity in the property thereafter, for, with the exception of the general statement of the witness Goldberg that the property was then worth about $15,000, there was nothing to contradict the evidence on the books of Famous Furniture Co. Inc. that the property was worth only $4,514.30, or something less than the amount of the loan to secure which the property was transferred.

Furthermore, even if it be assumed for the purpose of argument that Goldberg's testimony as to the value was correct or approximately so, the whole evidence clearly shows that Greenberg and petitioner purchased only a part of the merchandise, that is to say, the part on the upper floor; that more than $5,000 worth was not included in the sale and remained on the lower floor; and that of the merchandise on the upper floor, which Goldberg evaluated at $8,500, only a part was taken by Greenberg and petitioner, whereas about one-third was returned to the warehouse of Famous Furniture Co. Inc. in Brooklyn (R. 120).

It appears clear, therefore, that there was no evidence that Famous Furniture Co. Inc. owned or had any equity in the property claimed to have been transferred from the premises of B. Glass Inc. in Suffern to the place of business of Bergen Furniture Co. in Brooklyn.

Nor can petitioner's conviction rest upon the testimony incidentally given by one of the Government's witnesses that certain other property was transferred from the place of business of Famous Furniture Co. Inc. in Brooklyn to the premises of Bergen Furniture Co., for the testimony is explicit that this entire transaction was carried on by the Goldbergs and by Greenberg, and the record is barren of anything that would tend to show that petitioner participated in or had an interest in this particular transfer, or, indeed, that he had any knowledge thereof.

The foregoing failures of proof necessarily required the dismissal of the charges against the petitioner and his conviction on said charges was consequently contrary to law.

B. Assuming, though by no means conceding, that Famous Furniture Co. Inc. was shown to have had some property interest in the merchandise of B. Glass Inc., the fact remains nevertheless that there is no evidence in the record to show that petitioner knew of any such interest in Famous Furniture Co. Inc. So far as appears, when petitioner first came upon this merchandise it was in the premises of B. Glass Inc. in Suffern, New York, and the defendant Goldberg, the proprietor of B. Glass Inc., was making efforts to sell it. It is true that the Government's witness the co-defendant Goldberg went to great pains in his testimony in an effort to show by statement and by inference that petitioner's alleged subsequent dealings with respect to this furniture were had with an improper motive and for an unlawful purpose, but, even conceding all this to be true, for aught that appears by the record the petitioner's activities were concerned with property which petitioner had every right to believe belonged to B. Glass Inc., a corporation that never became a bankrupt.

It is respectfully submitted that on this state of the record the evidence does not sustain charges that petitioner knowingly and fraudulently transferred or concealed, or con-

spired knowingly and fraudulently, to transfer and conceal, property belonging to Famous Furniture Co. Inc., for it is evident that in the absence of evidence to show petitioner knew the property with which he was dealing belonged to Famous Furniture Co. Inc. he could not "*knowingly*" have committed any of the acts charged; nor could his dealings have been said to have been had in contemplation of a proceeding under the Bankruptcy Act against Famous Furniture Co. Inc., or in an attempt to defeat the provisions of the Act.

C. In any event, the Government's evidence, reduced to its essence and taken at its face value, showed conclusively that petitioner and Greenberg bought the merchandise on the top floor of the premises of B. Glass Inc. and agreed to pay a stated consideration therefor, to wit, 90% of its estimated value of $8,500. The question is thus posed as to whether or not evidence that petitioner and another, regardless of with what motives, purchased the property and after having received at least a part of it defaulted in paying the agreed purchase price, was evidence sufficient to prove petitioner's guilt of the charges of concealing, transferring and conspiring to conceal and transfer in anticipation of bankruptcy property which belonged to Famous Furniture Co. Inc.

It is respectfully submitted that the question thus presented must be answered in the negative and that petitioner's conviction upon such evidence was contrary to law.

D. The Learned Circuit Court of Appeals below, in its opinion affirming petitioner's conviction while conceding the seriousness of the foregoing doubts as to the sufficiency of the evidence against petitioner, and particularly the doubt as to whether or not Famous Furniture Co. Inc. had any interest or equity in the furniture in question, proceeded to render its affirmance upon assumptions which it apprehended might be taken from the record, although

in fact the record afforded no basis for the same. Thus the learned Circuit Court, in affirming the conviction, said:

> "Assuming the correctness of this position, i.e., that in order to charge the appellant (petitioner), it was necessary to show that the bankrupt had some equity in Suffern, furniture, there was nevertheless, a clear issue of fact to be decided; and the probability was strong that the mortgagee would not have lent $5000.00 unless there had been a substantial equity. Moreover, quite independently of this transfer, the other Goldberg transferred a substantial parcel of goods from the Famous Furniture Co. in Brooklyn, directly to Greenberg at the premises of the Bergen Furniture Co., and the appellant was implicated in this transfer as well as in that from Suffern."

Thus the learned Circuit Court affirmed on two grounds: the first a bare assumption, not in anywise established to be a fact, that the property in the Suffern store must have been worth more than the amount of the loan from Majestic Factors Corporation, because, if it had not been, the loan would not have been made on its security. It is obvious that the loan very well may have been made on inadequate security, and to base a conviction of petitioner upon a bare assumption that it was not, is clearly improper and wholly unjustified.

Moreover, considered in the light of the proof that but a fraction of the furniture at the premises of B. Glass Inc. went to petitioner and Greenberg, the assumption made by the Circuit Court is even less warranted.

The second point mentioned in the opinion was the direct transfer from Famous Furniture Co. Inc. to Greenberg at the premises of Bergen Furniture Co. The Circuit Court took it that this transfer alone was sufficient to sustain the charges made in the indictment, although there was not an iota of evidence in the entire case to show, the learned Circuit Court to the contrary notwithstanding, that petitioner was implicated in this transfer or that he ever had the slightest knowledge that such a transfer took place.

E. The learned Circuit Court, in its opinion hereinabove quoted in part, expressly recognized that there were issues involved that required determination by the jury, in addition to the bare question of whether or not petitioner participated in the transactions described by the Government's witnesses. For example: with respect to the question of whether or not Famous Furniture Co. Inc. or its trustee in bankruptcy had any interest in the Suffern furniture involved in these transactions, the learned Circuit Court below said, "There was nevertheless, a clear issue of fact to be decided; * * *".

It is submitted, however, that the learned Trial Judge in his charge to the jury (R. 467-490) omitted entirely to present these issues to the jury for its determination. On the contrary, it is clear from the text of the charge that the Trial Judge submitted, and the jury was given to understand, that there was but one issue to be determined by them, namely: the issue of whether or not petitioner participated in the transactions described by the witnesses; and the jury was told in effect that if such participation were established to their satisfaction they must bring in a verdict of guilt.

More specifically, after discussing generally the charges made in the indictment and the statutes applicable, and after giving a resumé of the evidence, the Court framed the issue for the jury's consideration in the following words:

> "Now as against the testimony of the Government's witnesses, you have the testimony of the defendant, Aronoff, first, that he had no financial interest in the Bergen Furniture Co.; that such services that he performed for that company were solely those of a salesman and that in the conference that took place between Goldberg, who was the President of the Famous Furniture Co., and Greenberg, he did not participate. He says that he was shoved off to one side and did not hear and was not permitted to hear what they discussed.

That is the issue with respect to the participation of the defendant Aronoff in the conspiracy and in the acts that are the subject of counts two and three" (R. 487-488).

The foregoing were the Court's closing words to the jury. That these words excluded from the jury's consideration all questions except the question of whether petitioner in fact participated in the transactions described is so obvious as to require no comment. In view of this fact, and of the fact that there were other issues in the case clearly recognized by the learned Circuit Court below, any one of which other issues, if determined by the jury in the negative, would have required a verdict of not guilty, it is patent that petitioner was deprived by the Judge's charge of his constitutional right to have the charges made against him tried fully by a jury of his peers.

It is respectfully submitted, in view of all of the foregoing, that the submission of the charges against petitioner to the jury was improper in form and in substance and that both the jury's verdict of guilt and the affirmance of the conviction by the learned Circuit Court below were made without any basis in the evidence and should be reviewed and reversed in toto.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 18749, Calendar No. 36, October 1943 Term, United States of America, Appellee, v. Julius Aronoff, Appellant, to the end that the case may be reviewed and determined by this Court as provided for by the statute of the United States, and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and

for such other and further relief as to this Court may seem proper.

Dated: December 16, 1943.

JULIUS ARONOFF,

By.....

CHARLES V. HALLEY, JR.,
Counsel for Petitioner.